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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL BLAKE DeFRANCE,

Defendant.

**CR 21-29-M-DLC**

**DEFENDANT DeFRANCE'S  
OPPOSED MOTION TO  
DISMISS INDICTMENT  
BECAUSE MONTANA PFMA  
(\$45-5-206 (2011)) IS INDIVISIBLE  
AND AN UNCONSTITUTIONAL  
NONCATEGORICAL VERSION  
OF 18 USC §921(a)(33)(A)(ii)**

**INTRODUCTION**

This is a firearms case where the government has charged that Mr. DeFrance unlawfully possessed firearms and ammunition on two specific dates in 2018 (ECF No. 2). According to the government what renders the two 2018 firearms/ammunition possessions unlawful is that prior to those possessions, Mr.

DeFrance “had been convicted on or about May 6, 2013, of a misdemeanor crime of domestic violence under the laws of the State of Montana . . . ”. *Id.*

### **MOTION TO DISMISS THE INDICTMENT**

COMES NOW Mr. DeFrance by and through his counsel of record, Michael Donahoe, and moves to dismiss the indictment under Fed. R. Crim. P. Rule 12(b)(3) because the grounds raised herein below are “reasonably available and the motion can be determined without a trial on the merits . . . ”. (*Id.*). In satisfaction of Fed. R. Crim. P. Rule 47(b) the grounds for this motion are as follows:

- Notwithstanding Judge Watters’ decisions in *United States v. Tymes*, CR 20-117-BLG-SPW, and *United States v. Goerndt*, CR 20-125-BLG-SPW, the relevant version of the Montana Partner Family Member Assault (PFMA) statute (2011) is both indivisible and overbroad consequently under the categorical approach a 2011 Montana PFMA cannot serve as a predicate to support a §922(g)(9) prosecution. Stated slightly differently, a 2011 Montana PFMA can be committed without the use, threatened use, or attempted use of force therefore since the Montana statutory term “bodily injury” is indivisible and includes both mental and emotional harm bodily injury can be inflicted without the use of force.
- Moreover, as a separate and additional ground for this motion, Mr. DeFrance contends that because the Montana 2011 PMFA statute *does contain* a relationship element this case is not controlled by *United States v. Hayes*, 555 U.S. 415 (2009), and the Court must categorically analyze the relationship element of the 2011 Montana PFMA statute *vis-à-vis* the federal definition of that term in 18 USC §921(a)(33)(A). Under this comparison the 2011 PFMA definition of the relationship element is indivisible, over-inclusive, and unconstitutional. *See e.g. United States v. Nobriga*, 408 F.3d 1178 (9<sup>th</sup> Cir. 2005) (under a plain error standard the relationship element

of the Hawaii Domestic Violence statute does not match the federal definition in §921(a)(33)(A)(ii)).

**CONTACT WITH OPPOSING COUNSEL**

Government counsel, Jennifer Clark, opposes this motion on behalf of the United States.

**CONCLUSION**

WHEREFORE based on this motion and the brief that supports it (ECF No. 17), the indictment ought to be dismissed.

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of August, 2021.

/s/ Michael Donahoe  
MICHAEL DONAHOE  
Deputy Federal Defender  
Counsel for Defendant

**CERTIFICATE OF SERVICE  
L.R. 5.2(b)**

I hereby certify that on August 18, 2021, a copy of the foregoing document was served on the following persons by the following means:

1 CM-ECF

2 Mail

1. CLERK, UNITED STATES DISTRICT COURT

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/s/ Michael Donahoe  
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